

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**SUMMONS FOR JUDGMENT NO.406 OF 2006
IN
SUMMARY SUIT NO.884 OF 2006**

Hemant C. Pandya ...Plaintiff

Versus

Shah & Mody Developers & Ors. ...Defendants

WITH

**SUMMONS FOR JUDGMENT NO.735 OF 2004
IN
SUMMARY SUIT NO.1964 OF 2004**

Kalypana Yagnik ...Plaintiff

Versus

Shah & Mody Developers & Ors. ...Defendants

WITH

**SUMMONS FOR JUDGMENT NO.740 OF 2004
IN
SUMMARY SUIT NO.1965 OF 2004**

Urvee H. Pandya ...Plaintiff

Versus

Shah & Mody Developers & Ors. ...Defendants

Shri Bharat R. Zaveri for the Plaintiff in all
Summonses for Judgment.

CORAM : ABHAY S.OKA, J.

DATE ON WHICH JUDGMENT IS RESERVED : JULY 24, 2007.

DATE ON WHICH JUDGMENT IS PRONOUNCED: AUGUST 30, 2007.

JUDGMENT:

1. The Summons for Judgment taken out in these
three suits can be disposed of conveniently by a

common order. The Defendants in all the three suits are the same. Summary Suit No.884 of 2006 is filed for recovery of sum of Rs.19,78,279/- alongwith further interest on Rs.13 lakhs at the rate of 18% per annum. According to the case of the Plaintiff, the 1st Defendant is a partnership firm and the 2nd to 4th Defendants are the partners of the 1st Defendant-Firm. As the 2nd to 4th Defendants were passing through financial crisis, they approached the Plaintiff for financial assistance and requested for a friendly loan of Rs.13 lakhs. According to the case of the Plaintiff, due to his cordial relationship with 2nd to 4th Defendants, he advanced a friendly loan of Rs.13 lakhs by five different cheques the particulars of which are as under:

DATE	CHEQUE	AMOUNT	BANK
06.01.1998	246424	3,00,000/-	Dena Bank, Kandivili (W) branch.
09.03.1998	246427	7,00,000/-	Dena Bank, Kandivili (W) branch.
08.10.1998	257046	50,000/-	Dena Bank, Kandivili

			(W)
			branch.
24.04.2000	185705	1,50,000/-	Dena Bank,
			Kandivili
			(W)
			branch.
01.09.2000	215554	1,00,000/-	Dena Bank,
			Kandivili
			(W)
			branch.

2. The said cheques were drawn in favour of the 1st Defendant and the same were duly encashed by the Defendants. It is the case of the Plaintiff that the 2nd to 4th Defendants had jointly and severally agreed to repay the said amount on demand with interest at the rate of 12% per annum on the said amount.

3. The Defendants issued post dated cheque in the sum of Rs.5 lakhs dated 01st December, 2000 towards the part payment. The Plaintiff has stated that the said cheque amount was realised. On the request made by the Defendants for grant of loan of Rs.5 lakhs, the Plaintiff gave a sum of Rs.5 lakhs to the Defendants by a cheque dated 15th December, 2000 drawn on Dena Bank, Kandivali (W) Branch. It is stated that interest was payable on the said amount at the rate of

12% per annum. It is alleged that as the Defendants were unable to repay the loan amount they had offered to pay interest at the rate of 24% per annum on the sum of Rs.13 lakhs from 01st April, 2001. The case of the Plaintiffs is that the Defendants acknowledged the debt by letter of confirmation dated 31st March, 2003 duly signed by the 4th Defendant on behalf of the 1st Defendant. It is stated that an affidavit-cum-declaration dated 23rd August, 2003 was duly signed by the 3rd Defendant on behalf of the 1st Defendant acknowledging the debt. Thereafter advocate's notices dated 24th October, 2003 and 15th December, 2003 were issued by the Plaintiffs calling upon the Defendants' to pay the outstanding amount with interest at the rate of 24% per annum. The claim in the suit made by the Plaintiff is for sum of Rs.13 lakhs with interest at the rate of 18% per annum from 01st April, 2001 in till the date of filing of the suit and for further interest at the rate of 18% per annum.

4. Summary Suit No.1964 of 2004 is also for recovery of the amount advanced to the Defendants with interest. In the said suit the case of the Plaintiff is that on the request made by the 2nd to 4th Defendants, friendly loan of Rs.8,50,000/- was advanced by the Plaintiff to the Defendants by two

cheques dated 23rd March, 2000 and 07th April, 2000 in the sum of Rs.4,00,000/- and Rs.4,50,000/- drawn on Vijaya Bank, Bombay Branch. A case is made out that the Defendants had agreed to repay the amount on demand with interest at the rate of 12% per annum. It is stated that a part payment of Rs.6 lakhs was made by the Defendants. It is stated that the Defendants paid interest upto 31st March, 2001 and as they were unable to pay the loan amount they offered to pay interest at the rate of 24% per annum on the sum of Rs.2,50,000/- from 01st April, 2001. As in case of earlier suit, it is stated that 4th Defendant on behalf of the 1st Defendant acknowledged the debt by a confirmation letter dated 31st March, 2003 and the 3rd Defendant on behalf of the 1st Defendant executed an agreement-cum-declaration dated 25th August, 2003 acknowledging the debt. Demand notices were issued by the Plaintiff through her Advocate calling upon the Defendants to pay a sum of Rs.2,50,000/- with interest at the rate of 24% per annum. The claim in the suit is for recovery of sum of Rs.2,50,000/- with interest at the rate of 18% per annum on the said amount from 01st April, 2001 till the date of filing of the suit and for further interest at the rate of 18% per annum.

5. Suit No.1965 of 2004 is filed for recovery of loan advanced by the Plaintiff to the Defendants with

interest thereon. In this suit the case of the Plaintiff is that on the request made by the 2nd to 4th Defendants she advanced a friendly loan of Rs.3,50,000/- by three cheques dated 24th April, 2000, 01st April, 2000 and 18th August, 2000 in the sum of Rs.1,00,000/-, Rs.1,00,000/- and Rs.1,50,000/- respectively drawn on the State Bank of Saurashtra, Kandivali (W) Branch. It is alleged that the Defendants agreed to repay the said amount with interest at the rate 18% per annum and they paid the interest till 31st March, 2001. As the Defendants were unable to pay the debt, they offered to pay interest at the rate of 24% per annum from 01st April, 2001. As in other two suits reliance is placed on the acknowledgment of debt by a letter of confirmation dated 31st March, 2003 signed by 4th Defendant on behalf of the 1st Defendant and an affidavit-cum-declaration dated 25th August, 2003 signed by the 3rd Defendant on behalf of the 1st Defendant. Reliance is placed on advocate's notices dated 24th October, 2003 and 15th December, 2003. The claim in the suit is for recovery of sum of Rs.3,50,000/- with interest thereon at the rate of 18% per annum from the date of filing of the suit till presentation of the plaint and further interest at the same rate.

6. A Summons for Judgment has been taken out by the Plaintiff. Reply has been filed to the summons for judgment by the Defendants. There is a rejoinder filed by the Plaintiff to the said reply. The stand taken by the Defendants is that the transaction was not of a friendly loan. The Plaintiff had given the amounts which are subject matter of the three suits as loan to be used in business in order to earn interest. It is stated that the interest was being paid to the Plaintiff from time to time. It is contended that the alleged letter of acknowledgment dated 31st March, 2003 has been issued only for income tax purposes. It is stated that signature of the 3rd Defendant was obtained on stamp papers/writings containing several bankers and declaration dated 25th August, 2003 has been prepared by using the said stamp paper/writing.

7. The Defendants is contended that the cause of action on the basis of which the present suit has been filed does not fall within the ambit of Order XXXVII Rule 2 of the Code of Civil Procedure, 1908. It is submitted that the suit is hit by provisions of the Money Lenders Act, 1946 as the Plaintiff is a money lender and is carrying on business without obtaining licence as required by law.

8. The learned counsel for the Plaintiff contended

that loan transaction is admitted in all three suits and the defence raised is only technical which has no basis. It is submitted that the defence is bogus and hence the Plaintiffs are entitled to a decree. The learned counsel for the Defendants has placed reliance on a decision of Full Bench of this Court dated 26th April, 2007 in **Summons for Judgment No.1117 of 2003 in Summary Suit No.1551 of 2003 (Jyotsna K. Valia Vs. M/s. T.S.Parekh & Company)** and other connected cases. He submitted that the Full Bench has held that a summary suit on a honoured cheque is not maintainable. He submitted that in absence of a concluded contract in writing containing an express or implied promise to pay, the summary suit is not maintainable.

9. I have carefully considered the submissions. The facts of the three suits are more or less identical and only the amounts involved are different. Perusal of the complaints shows that the suit is not based only on honoured cheques. The suit is based on acknowledgment of debt in the form of Exhibit 'B' annexed to the complaint as well as affidavit-cum-declaration dated 25th August, 2003 annexed as Exhibit 'C' to the complaint.

10. In Summary Suit No.884 of 2006 the document at Exhibit 'B' is a confirmation letter for income tax

purposes duly signed by Shri H.N. Shah (the fourth Defendant), a partner of the first Defendant. Paragraph No.10 of the plaint in Suit No.884 of 2006 refers to the said document. The averments made in paragraph No.10 are dealt with by the Defendants in paragraph No.13 of the affidavit-in-reply filed to the Summons for Judgment. In the said paragraph No.13, the Defendants have not disputed the execution of the letter of confirmation dated 31st March, 2003. The said affidavit-in-reply has been filed by the third Defendant Shri Niranjana Shah, a partner of the first Defendant. It is merely stated that the letter was issued for income tax purpose. About the affidavit-cum-declaration dated 25th August, 2003 it is stated in paragraph No.13 that the signatures/initials of the partner were obtained on one stamp paper/writing which contains several blanks. It is stated that the signature has not been attested either by a Magistrate or a Notary as required to be done in law.

11. The perusal of the affidavit-cum-declaration annexed to Suit No.884 of 2006 shows that the stamp paper has been purchased in the name of the first Defendant. On page 1 of the said affidavit-cum-declaration apart from adding name of Shri Niranjana V. Shah by hand particulars of cheque

dated 01st September, 2000 in the sum of Rs.1 lac have been added by hand. The particulars of other four cheques are typewritten. In paragraph No.3 of the plaint, a reference has been made to the same five cheques issued by the Plaintiff to the Defendants. In affidavit-in-reply, it is not the case made out that the first Defendant has not encashed the said cheques. Infact, the receipt of the amounts covered by the said five cheques seems to be admitted. There is also a reference in the said document to the fact that a repayment of a sum of Rs.5,00,000/- was made and thereafter the Plaintiff advanced an amount of Rs.5,00,000/-. On page 2 of the said affidavit-cum-declaration the material figures of Rs.13,00,000/- and Rs.19,98,880/- have been typewritten. Even the rate of interest is typewritten. Wherever corrections are made by hand, initials of the third Defendant said Shri Niranjan V. Shah have been made. In any event even if hand written corrections are ignored, still the liability to pay Rs.13,00,000/- with interest at the rate of 24% per annum from 01st April, 2001 is clearly admitted by the said document. Clause Nos.9 to 13 of the said affidavit-cum-declaration read thus:

"(9) Since we were unable to repay the loan amount, instead we, the partners, offered him

higher b.d.c. of 24% per annum on the loan amount of Rs.13,00,000/-, from 1/4/2001, payable quarterly. We hereby confirm and declare that we are liable to pay 24% per annum b.d.c on the said loan from 1/4/2001 onwards.

(10) However, we again failed to fulfil our commitment. Therefore, we are committed and liable to pay cumulative b.d.c at the rate of 24% per annum to Mr.Hemant C. Pandya, on the principal amount of Rs.13,00,000/-.

(11) I confirm that we were given sufficient time, but we have failed to fulfil our liability.

(12) I confirm that we have received a legal notice dated 9/2/2003 from Mr. Hemant C. Pandya, but even after receiving the abovesaid notice, and sufficient grace time given to us, we have failed to make committed repayment.

(13) M/s.Shah and Mody Developers hereby confirm that we are under liability to pay dues of Rs.19,98,880/- (Rs.19 lakhs, 98

thousand, eight hundred eighty only)
including principal amount upto 31/3/2003".

12. It is true that the aforesaid document cannot be read as an affidavit as the same has not been affirmed before an officer who is empowered to administer an oath. However, it is the document styled not merely as an affidavit but also as a declaration. It is, therefore, binding on the Defendants. As stated earlier there is no dispute regarding receipt of sum of Rs.13 lakhs by the 1st Defendant from the Plaintiff. There is no dispute about the execution of confirmation letter by the fourth Defendant. There is no dispute about the execution of the declaration by the third Defendant. There are similar declarations executed by the third Defendant in the two other suits. Only the amounts are different. The said declarations contain the particulars of the amounts payable by the Defendants with the agreed rate of interest. There are similar confirmation letters in two other suits.

13. In the decision of the Full Bench in the case of Jyotsna K. Valia (supra) which is relied upon by the counsel for the Defendants the Full Bench has held that in so far as acknowledgments in writing or receipts are concerned, it was not possible to lay

down any precise test as to when a summary suit would lie on an acknowledgment on writing or a receipt. Full Bench held that whether a summary suit will lie on acknowledgment in writing or a receipt would depend on the document itself and facts of each case.

14. If the document at Exhibit 'B' and document at Exhibit 'C' are considered together, a case of concluded contract containing an express promise to pay the amount with interest is certainly made out. The documents have been executed by the Defendants who are admittedly the partners of the first Defendant. It is contended in affidavit in reply that there is no agreement between the parties for payment of interest, however, the document at Exhibit 'C' in the three suits reflects existence of an agreement between the parties to pay interest at the rate of 24% per annum on the principal amount with effect from 01st April, 2001.

15. The other defence of the Defendants is that the transactions in all the three suits are hit by the Money Lenders Act. A contention is raised is that there is nothing on record to show that there was a friendly relationship between the parties and therefore the loan advanced by the Plaintiff cannot be a friendly loan. The Plaintiffs in these three suits

are not the same though they are members of the same family. The Defendants have not set out instances to show that the Plaintiffs have advanced the amounts to other persons to establish that they are carrying on money lending business. Therefore, the said defence has no merit.

16. In the case of **M/s.Mechalec Engineering and Manufacturers Vs. Basic Equipment Corporation (AIR 1977 Supreme Court Page 577)** has laid down the tests for dealing with Application for grant of leave to defend. Considering the nature of the defence raised in these suits it can be said that the defence raised appears to be illusory or practically moonshine. All the payments made by the Plaintiffs are by cheques which are admittedly encashed. The amounts are admittedly not repaid. The Plaintiffs have prayed for interest at the rate of 18% per annum though the agreed rate is 24% per annum. Therefore, considering the facts of the case, these three suits will be governed by fourth test laid down by the Apex Court in the aforesaid case. Hence, the Plaintiffs will be entitled to a judgment in the three suits. Considering the facts of the case the further interest will be payable at the rate of 12% per annum.

17. Before parting with this order, another aspect

of the case will have to be considered. On 05th July, 2007 the submissions of the parties were heard in these cases. After fully hearing the submissions, the order was not passed immediately to enable the parties to discuss amicable settlement. Accordingly, matters were kept on 10th July, 2007 for passing order. The matters appeared on board on 13th July, 2007 when it was noticed that the office had misplaced the papers of one of the three suits and therefore, on 13th July, 2007 a direction was given to the concerned officer in the office to submit an explanation how the papers were misplaced. To enable the office to submit the report, the judgment on Summons of Judgment was reserved. An explanation has been submitted by the clerk of the Record Department. It is stated that the papers of the matters of the year 2006 are required to be kept on the floor due to insufficient space in the Department. As a result notwithstanding diligent search, the papers could not be traced. Unconditional apology has been tendered by the concerned clerk. I am accepting the apology and the explanation. No further action is called for against the concerned staff members. However, the report reflects a very sorry state of affairs in the office of the Original Side. Steps will have to be taken for making available adequate storage place to the office of the Original Side. Adequate storage racks/cupboards will

have to be provided to the office. The Prothonotary and Senior Master will place a copy of this order before the Hon'ble the Chief Justice and Administrative Judges of this Court for bringing it to their notice the sorry state of affairs in the office of the Original Side due to lack of proper infrastructure.

18. Hence, I pass the following order:

- (i) There will be a decree in the three suits as prayed with modification that interest payable will be at the rate of 12% from the date of the suit till realisation or payment. Time of four months is granted to the Defendants to pay the decretal amount.
- (ii) Summons for Judgment No.406 of 2006, Summons for Judgment No.735 of 2004 and Summons for Judgment No.740 of 2004 are disposed of in above terms.
- (iii) The Prothonotary and Senior Master will comply with the direction in paragraph No.17 above.

JUDGE